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No. 88-798

In The

Supreme Court of the United States

October Term, 1988

DONALD P. HODEL, SECRETARY OF THE INTERIOR

Petitioner,

v.

THE MUSCOGEE (CREEK) NATION

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Muscogee (Creek) Nation may operate tribal courts established under a constitution adopted by the Nation and approved by the Secretary of the Interior pursuant to the Oklahoma Indian Welfare Act of 1936, 25 U.S.C. 501 et seq.?

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION

STATEMENT

On August 17, 1979, the Secretary of the Interior approved a new Constitution for the Muscogee (Creek) Nation (Nation) providing for executive, legislative and judicial branches.[1] The Nation, pursuant to its Constitution, subsequently adopted a judicial code providing that its courts would exercise general civil and criminal jurisdiction limited to enrolled members of the Tribe. When

[1] The Secretary had been ordered to supervise the adoption of a new Constitution. *Harjo v. Andrus*, 581 F.2d 949 (D.C. Cir. 1978).

the Nation sought federal funding for this tribal court system, the Secretary denied the request on the ground that the Nation was precluded from having a court system because of the effect of the Curtis Act of June 28, 1898, 30 Stat. 495. As part of a policy of forcing the Five Tribes[2] of Oklahoma to agree to allotment, the Curtis Act had abolished tribal court systems unless the tribe entered into and ratified allotment agreements that specifically preserved those tribal courts. It was the Secretary's position that this Act still bars the Creek Nation from establishing and operating tribal courts.

The Nation appealed this decision administratively and when that proved unsuccessful, brought suit against the Secretary in federal court. The Court of Appeals for the District of Columbia Circuit set aside the Secretary's decision. The Court of Appeals held that the Curtis Act's prohibition of tribal courts, while not specifically repealed by subsequent allotment legislation, has been repealed by the 1936 Oklahoma Indian Welfare Act, 25 U.S.C. § 501 et seq. [hereinafter OIWA], and that the Nation, like other Tribes nationwide, is entitled to have a tribal court. The Secretary has petitioned this Court for review.

Rather than respond to the Interior's statement, the Muscogee (Creek) Nation refers this Court to the statement of facts contained in the Court of Appeals decision. *See* Petition at 1a-6a.

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[2] These tribes, so-called the "Five Civilized Tribes," consist of the Seminoles, Creeks, Choctaws, Chickasaws, and Cherokees, and are all located in eastern Oklahoma. During the late nineteenth century Congress enacted numerous statutes affecting the Five Tribes as a group, resulting in common, but not identical, legal histories for the Five Tribes.

REASONS FOR DENYING THE WRIT

Although the Secretary of the Interior argues the Court of Appeals erred in recognizing the authority of the Muscogee (Creek) Nation to maintain tribal courts, Petition at 17-24, he does not seek immediate plenary review of the Court's judgment by this Court. Instead, he asks the Court to hold this case pending decisions and possible petitions for writs of certiorari in supposedly related cases in which neither the United States nor the Muscogee Nation is a party. Petition at 28.

This Court should deny that request and promptly deny review in this case for several reasons. First, the Muscogee Nation has been gravely harmed by the Secretary's long-continued obstruction of the functioning of its tribal government. Second, this case presents no question of general importance in federal Indian law. Third, this case does not involve the issue of primary concern to the United States: the jurisdictional status of restricted Indian allotments of the Five Tribes. Finally, there is no conflict between the decision below and controlling state and federal precedent.

1. Postponing Action On The Petition Would Prolong Without Justification The Government's Longstanding Obstruction Of The Nation's Tribal Government.

The judgment below sets aside the Secretary of the Interior's refusal to recognize the authority of the Nation to maintain tribal courts. The Nation established its tribal court system pursuant to a constitution adopted by it in 1979 and approved by the Secretary. The constitution vests the Nation's judicial power "in one Supreme Court

limited to matters of The Muscogee (Creek) Nation's jurisdiction and in such inferior courts as the National Council may from time to time ordain." Muscogee (Creek) Nation Constitution, Art. VII, Sec. 1. The Nation has maintained tribal courts since 1982.

The Nation established its present constitutional government only after protracted litigation against the Secretary. This litigation followed decades of recurrent and deliberate frustration of the Nation's governmental structure by the Secretary. *See generally Harjo v. Kleppe*, 420 F.Supp 1110 (D.D.C. 1976), *aff'd sub nom, Harjo v. Andrus*, 581 F.2d 949 (D.C. Cir. 1978). District Judge Bryant, after meticulous review of this history in *Harjo*, stated that the Secretary's "attitude, which can only be characterized as bureaucratic imperialism, manifested itself in deliberate attempts to frustrate, debilitate and generally prevent from functioning the tribal governments [of the Five Civilized Tribes, including the Nation] expressly preserved" by Congress. 420 F.Supp at 1130. Judge Bryant observed that for decades, *continuing into the 1970s*, "the Department successfully pre-empted the constitutional processes of the tribe for its own purpose," and the "influence of the Bureau over the various incarnations of the Creek national government between 1920 and 1970 was exercised wholly without the benefit of any congressional mandate." *Id.* at 1132, 1139.

Judge Bryant summarized the Nation's claim in *Harjo* as "at bottom, simply an assertion of their right to democratic self-government" and concluded that the "plaintiffs have demonstrated a clear legal entitlement to have these

rights vindicated, and the Court cannot honorably fail to do otherwise." *Id.* at 1143.[3]

The Secretary of Interior, in essence, asks this Court to hold this case so as to "preserve the opportunity for a comprehensive and coherent resolution of the various jurisdictional issues raised by "parallel state and federal cases." Petition at 27-28. The delay proposed by the Secretary is without justification. It would merely continue the grave and longstanding harm to the Nation posed by the Secretary's obstruction of the Nation's tribal government processes. This Court should deny the petition forthwith.

2. This Case Presents No Question of General Importance in Federal Indian Law.

The Court of Appeals decision is of limited applicability, as it simply holds that the OIWA authorized the Muscogee Nation to adopt a constitution providing for exercise of judicial powers. Although it is of great importance to the Muscogee Nation, it potentially affects the judicial authority of only one other tribe in Oklahoma,

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[3] *See also* Administrative Law Judge Muskrat's reluctant special concurrence in the decision of the Interior Board of Indian Appeals in the present case:

> "The court in *Harjo* recited the contemptible history of Federal dealings with the Creek Nation . . . The case before us demonstrates the continuation of this bureaucratic imperialism against the tribe's judicial branch. This, in my judgment, constitutes a serious violation of the United States' trust responsibility to the Muscogee (Creek) Nation." Petition at 52a.

the Cherokee Nation.[4] The judicial authority of the other three of the Five Tribes has been recognized only recently,[5] and most of the numerous other tribes in Oklahoma maintain court systems.[6] Thus, the court of

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[4] The Cherokees had refused to negotiate any allotment agreement prior to enactment of the Curtis Act, and the allotment act which was finally enacted into law, like the Creek Allotment Act, expressly provided that the Cherokee courts were not revived. *See* 5 Annual Report of the Commission to the Five Civilized Tribes (1898); *See also* Cherokee Allotment Act of March 1, 1901, 21 Stat. 848, § 72.

[5] The Court of Appeals recognized that the Choctaws and Chickasaws avoided the Curtis Act abolition of tribal courts by ratifying allotment agreements superceding the Curtis Act tribal court provision before it took effect. Petition at 4a. This was consistent with the District Court's similar findings concerning preservation of the Seminole tribal courts. Petition at 29a. Up until the District Court decision, the Secretary had insisted that the Curtis Act abolished the courts of each of the Five Tribes. After that decision, the Secretary dealt with the issue of the Creek Nation's judicial authority separately. See Associate Solicitor's Memorandum of January 12, 1984 (C.A. App. 4-64). The authority of the Seminoles, Choctaws, and Chickasaws to maintain courts is now conceded by the Secretary. Petition at 6 and n.5. Yet ironically, the Secretary cites their alleged lack of tribal courts as further reason to believe that revitalization of the Muscogee Nation courts is unnecessary. Petition at 22, n.14. In fact, the Secretary's incorrect interpretation and implementation of the Curtis Act has as a practical matter prevented the Choctaws, Chickasaw, and Seminoles from maintaining tribal courts, not lack of necessity or interest on the part of those tribes.

[6] The Secretary has funded courts for all Oklahoma tribes, other than the Five Tribes. 25 C.F.R. § 11.1 (1987) At present, these Oklahoma tribes exercise tribal court jurisdiction in the form of Courts of Indian Offenses ("CFR Courts") or separate tribal courts. These courts exercise "checkerboard" jurisdiction over civil and criminal matters.

Appeals' recognition of the judicial authority of the Muscogee (Creek) Nation simply places the Nation on an equal footing with other Oklahoma tribes, and with virtually every other tribe in the country.

While arguing that the Court of Appeals erred in interpreting the OIWA to allow the Muscogee (Creek) Nation to exercise judicial powers,[7] the Secretary concedes in this Court the authority of the Nation to maintain a tribal court. Petition at p. 11, n.11. The Secretary presents no legal authority for this "limited" tribal court. The Nation's authority to exercise judicial powers through its tribal court is the sole issue in the present case.

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[7] The Secretary's arguments on the merits require little response, because the Court of Appeals decision has already extensively and correctly addressed those arguments in its opinion. *See* Petition at 7a - 15a. The Indians Reorganization Act of 1934, 25 U.S.C. § 476, allows tribes outside Oklahoma to adopt constitutions to exercise "all powers vested in any tribe or tribal council by existing law." Petition at 5a. When Congress separately addressed the reorganization of Oklahoma tribes two years later in the OIWA, it did not include that limitation in the provision concerning tribal constitutions. The Court of Appeals decision recognized that if Congress had intended such a limitation to apply to Oklahoma tribes, it could have either simply amended the IRA to include Oklahoma tribes, or added a similar provision in the OIWA. The Court of Appeals applied standard rules of statutory construction of federal Indian law in arriving at its conclusion that Congress did not intend to limit tribes organizing under the OIWA to the exercise of "powers vested . . . . by existing law." The Court of Appeals decision allows a sensible equalizing principle to be implemented.

3. There Is No "Common Jurisdictional Issue" Raised By The Supposedly "Parallel" State Cases.

a. The Judgment In the Present Case Is Not Predicated On The Jurisdictional Status of Restricted Allotments.

In essence, the Secretary's quarrel is not with the D.C. Circuit's holding, but with the lower court's "perception" that the State of Oklahoma lacks criminal jurisdiction over restricted allotments of the Muscogee (Creek) Nation. The Secretary believes this "perception" is wrong, and that the State has criminal jurisdiction over restricted allotments of the Five Civilized Tribes.[8]

With all respect to the Secretary, this Court sits to review judgments, not "perceptions" that are "not 'critical' to" a lower court's decision. Petition at 25. As this Court recently held in *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842 (1984), "since this Court reviews judgments, not opinions, we must determine whether the Court of Appeal's legal error resulted in an erroneous judgment . . . " (footnote omitted). The judgment below is

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[8] The Secretary states "it is the longstanding position of the United States and the State of Oklahoma that the State does have jurisdiction over ordinary crimes commited by Indians on both restricted allotments and tribal lands within the original territory of the Five Civilized Tribes and eastern Oklahoma". Petition at 24. However, the Secretary obscures the fact that the federal government currently exercises federal jurisdiction over major crimes in eastern Oklahoma. The federal court recently convicted a Muscogee citizen for the murder of another Muscogee citizen on a Muscogee allotment. *United States v. Sands*, Docket No. 88-21-Cr (E.D.Ok. Sept. 13, 1988), *appeal docketed* No. 88-2514 (10th Cir. Sept. 30, 1988) (appeal on issues other than jurisdiction). *See* Appendix A at 1a-6a.

plainly not predicated on the jurisdictional status of restricted Creek allotments. The Secretary so admits. Petition at 26. ("We do not, however, suggest that the Court grant plenary review in the instant case at the present time based on the Court of Appeals' assumption regarding the scope of state jurisdiction, *since that question is not directly involved in this case").* (Emphasis added).

b. The *Brooks* And *Klindt* Cases, On Rehearing Before the Oklahoma Court of Criminal Appeals, Are Unlikely To Present Any Question As To The Jurisdictional Status Of Restricted Allotments.

The state cases which the Secretary suggests are "parallel" to this case also do not present the jurisdictional question that concerns the Secretary: Whether state or federal courts have jurisdiction to try crimes occurring on restricted allotments of the Five Tribes. The two cases relied on by the Secretary are *State v. Brooks,* No. 2-80117 (Okla. Cr. App. Oct. 14, 1988) (*See* Appendix B, at 7a) and *State v. Klindt,* No. S-84-781 (Okla. Cr. App. Nov. 7, 1986), opinion withdrawn and rehearing granted (July 26, 1988). (*See* Appendix C, at 16a).

Brooks concerns criminal enforcement of state cigarette taxes on sales by an Indian smokeshop to nonmembers. The original *Brooks* Court of Criminal Appeals opinion expressly held that the restricted allotments of the Five Tribes are Indian Country, and that the State has no jurisdiction to prosecute a crime by an Indian in Indian Country. That opinion was withdrawn and replaced by the new decision, which makes no express holding as to the Indian Country status of a restricted Creek allotment. Instead, the Oklahoma Court of Criminal Appeals upheld the lower court's dismissal of the

prosecution of the Indian defendants, because of an insufficiency in the criminal information which did not charge violations of state tax laws for sales to non-Indians as opposed to sales to Indians. Of relevance in the present case, the Secretary does not suggest any inconsistency between the *Brooks* decision and this Court's holdings in *California State Board of Equalization v. Chemehuevi Indian Tribe*, 474 U.S. 9 (1985); *Washington v. Confederated Colville Tribes*, 447 U.S. 134 (1980) and *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976).[9]

Klindt is still pending before the Oklahoma Court of Criminal Appeals on the motion for rehearing. *Klindt* involves an assault with dangerous weapon on a Cherokee restricted allotment by a person who has not offered any proof that he is an Indian. This case has no likely relevance to the present case, nor to the jurisdictional issues of concern to the Secretary. As the Secretary recognizes, Petition at 9, n.7, it is well settled that state courts have jurisdiction over crimes committed by non-Indians where the victim is not an Indian, even in Indian Country. e.g., *United States v. Draper*, 164 U.S. 240 (1896); *United States v. McBratney*, 104 U.S. 621 (1882); *Goforth v. State*, 644 P.2d 114 (Okla. Cr. 1982).

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[9] The Secretary incorrectly suggests that "the recent decision in *Brooks* instead discusses the scope of the State's taxing and related regulatory authority over matters *affecting Indians* on a restricted allotment". Petition at 25 (emphasis added). Nothing in the recent *Brooks* opinion in any way suggests any state jurisdiction over Indian smokeshops beyond what has been sanctioned by this Court in *Chemehuevi*, *Colville*, and *Moe*.

The Secretary speculates that "if the State does file a petition in *Brooks,* it is *possible* that a decision by this Court in the State's favor would . . . (conclude) that the State has ordinary civil and criminal jurisdiction over matters affecting Indians on Indians lands" Petition at 25. (emphasis added). This is pure conjecture, and an unlikely conjecture at that. There is simply no reason to delay implementation of the D.C. Circuit's judgment on the speculation that the State *may* seek review of *Brooks* or *Klindt,* which, in any event, do not present the issue of concern to the Secretary, or any issue worthy of review by this Court.

4. There is No Conflict Between The Decision Below And Controlling State and Federal Court Decisions.

The Secretary presupposes a federal-state conflict between the "perception" of the Court of Appeals in this case and *Ex parte Nowabbi,* 60 Okl. Cr. 111, 61 P.2d 1139 (1936). Petition at 24 - 26. There is, however, no reason to believe that *Nowabbi* is good law today. *Nowabbi* was criticized and withdrawn by the Oklahoma Supreme Court in *State ex rel May v. Seneca-Cayuga Tribe,* 711 P.2d 77, 81, n.17 (1985). The reasoning of *Nowabbi* is obviously flawed as recognized by the court in *May v. Seneca-Cayuga,* 711 P.2d at 81. *See also Felix S. Cohen's Handbook of Federal Indian Law,* (1982 ed.), pp. 777-780 and especially n.84.

Consideration of the Secretary's jurisdictional issue should await a case squarely presenting that issue, if indeed plenary consideration of that question by this

Court ever proves necessary. There is no reason to postulate likelihood that federal and state courts will differ if this question is litigated. In the past decade, federal and state courts have agreed on the "Indian Country" status of: (1) restricted Osage allotments, *State v. Burnett*, 671 P.2d 1165 (Okla. Cr. 1983); *United States v. Burnett*, 777 F.2d 593 (10th Cir. 1985) (following *United States v. Ramsey*, 271 U.S. 467 (1926)), (2) Kiowa trust allotments, *State v. Littlechief*, 573 P.2d 263 (Okla. Cr. 1978) (agreeing with unpublished federal district court decision to the same effect, *see* 573 P.2d at 264), and (3) tribal trust lands, compare *State ex rel. May v. Seneca-Cayuga Tribe*, 711 P.2d 77 (Okla. 1985) (Quapaw tribal lands) with *Indian Country USA v. Oklahoma Tax Commission*, 829 F.2d 967 (10th Cir. 1987) *cert. den. sub. nom., Oklahoma Tax Commission v. Muscogee (Creek) Nation*, ___ U.S. ___, 108 S.Ct. 2870 (1988) (tribal lands of Creek Nation).

CONCLUSION

The Muscogee (Creek) Nation has suffered many impediments at the hands of the Secretary of the Interior. Grant of certiorari and the holding of this case in abeyance until the State of Oklahoma, an adversarial nonparty to this action, makes decisions on two unrelated cases would irreparably harm the Muscogee (Creek) Nation. This case should not be held in abeyance. Appellant's petition for writ of certiorari should be denied.

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APPENDIX A

United States District Court
EASTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA	JUDGMENT IN A CRIMINAL CASE
V.	(Filed September 13, 1988)
RICKY LEE SANDS	Case Number: 88-21-CR

(Name and Address of Defendant)
Steven Greubel, Asst. P.D.
Attorney for Defendant

THE DEFENDANT ENTERED A PLEA OF:
[[x] guilty [ ] nolo contendere] as to count(s) Two, and
[ ] not guilty as to count(s) _____ .

THERE WAS A:
[[ ] finding [xx] verdict] of guilty as to count(s) One.

THERE WAS A:
[[ ] finding [ ] verdict] of not guilty as to count(s) ___.
[ ] judgment of acquittal as to count(s) _____ .
The defendant is acquitted and discharged as to this/these count(s).

THE DEFENDANT IS CONVICTED OF THE OFFENSE(S) OF: On or about the 12th day of December, 1987, in the Eastern District of Oklahoma, the defendant did commit murder, and possess a firearm moved interstate, after former felony conviction, all in violation of Title 18, United States Code, Section 1153, 1111, 922(g)(1) and 924(a)(1)(B).

IT IS THE JUDGMENT OF THIS COURT THAT: as to Count 1, the defendant is committed to the custody of the Attorney General of the United States or his authorized

representative for imprisonment for a term of life. It is adjudged that as to Count 2, the defendant is committed to the custody of the Attorney General of the United States or his authorized representative for imprisonment for a term of Five (5) years. The sentence imposed in Count 2 is to run consecutively to the sentence imposed in Count 1. Restitution has been considered in this case, but due to the defendant's current and potential financial status, no restitution will be ordered.

In addition to any conditions of probation imposed above, IT IS ORDERED that the conditions of probation set out on the reverse of this judgment are imposed.

CONDITIONS OF PROBATION

Where probation has been ordered the defendant shall:

(1) refrain from violation of any law (federal, state, and local) and get in touch immediately with your probation officer if arrested or questioned by a law-enforcement officer;

(2) associate only with law-abiding persons and maintain reasonable hours;

(3) work regularly at a lawful occupation and support your legal dependents, if any, to the best of your ability. (When out of work notify your probation officer at once, and consult him prior to job changes);

(4) not leave the judicial district without permission of the probation officer;

(5) notify your probation officer immediately of any changes in your place of residence;

(6) follow the probation officer's instructions and report as directed.

The court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within the maximum probation period of 5 years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

IT IS FURTHER ORDERED that the defendant shall pay a total special assessment of $100.00 pursuant to Title 18, U.S.C. Section 3013 for count(s) 1 and 2 as follows:

IT IS FURTHER ORDERED THAT counts ___ are DISMISSED on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall pay to the United States attorney for this district any amount imposed as a fine, restitution or special assessment. The defendant shall pay to the clerk of the court any amount imposed as a cost of prosecution. Until all fines, restitution, special assessments and costs are fully paid, the defendant shall immediately notify the United States attorney for this district of any change in name and address.

IT IS FURTHER ORDERED that the clerk of the court deliver a certified copy of this judgment to the United States marshal of this district.

[ ] The Court orders commitment to the custody of the Attorney General and recommends:

September 13, 1988
Date of Imposition of Sentence

/s/ Frank H. Seay
Signature of Judicial Officer

Frank H. Seay, U.S. District Judge
Name and Title of Judicial Officer

September 13, 1988
Date

RETURN

I have executed this Judgment as follows:

_____

_____

_____

Defendant delivered on ___ to _____ at _____, the institution designated by the Attorney General, with a certified copy of this Judgment in a Criminal Case.

_____
United States Marshal

By _____
Deputy Marshal

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff,	)	No. 88-21-CR
vs.	)	
RICKY LEE SANDS, Defendant.	)	

INDICTMENT
(Filed April 19, 1988)

The Grand Jury charges:

COUNT I

(18 USC §1153 and 18 USC §1111)

On or about the 12th day of December, 1987, at Okfuskee County, Oklahoma, in Indian Country, in the Eastern District of Oklahoma, RICKY LEE SANDS, an Indian, did wilfully and without justifiable cause, wrongfully, unlawfully, with premeditation and malice aforethought, kill a human being, that is, John Mauldin, by shooting John Mauldin with a .22 caliber pistol, thereby causing mortal wounds from which John Mauldin did languish and die, in violation of Title 18, United States Code, Section 1153 and Title 18, United States Code, Section 1111.

COUNT II

(18 USC §922(g)(1) and §924(a)(1)(B))

On or about the 12th day of December, 1987, in the Eastern District of Oklahoma, RICKY LEE SANDS, defendant herein, knowingly and intentionally did possess in commerce, firearms, to-wit: a .22 caliber pistol, and a single shot .410 shotgun, serial number AL212488, which

had previously been shipped or transported in interstate commerce, said defendant having prior thereto been convicted in the District Court of Okfuskee County, State of Oklahoma, of felonies punishable by imprisonment for terms exceeding one year; all in violation of Title 18, United States Code, Section 922(g)(1) and Title 18, United States Code Section 924(a)(1)(B).

A TRUE BILL

/s/ Robert W. Bush
GRAND JURY FOREMAN

/s/ Roger Hilfiger
ROGER HILFIGER
United States Attorney

/s/ Sheldon J. Sperling
SHELDON J. SPERLING
Assistant United States Attorney

APPENDIX B

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

THE STATE OF OKLAHOMA Appellant, -vs- CHESTER LEE BROOKS, A/K/A ACHISSON AMENSHI, and LARRY JOE BROOKS, Appellees.	)	No. S-85-117

OPINION ON REHEARING

(Filed Oct. 14, 1988)

BRETT, Presiding Judge:

Appellants, Chester Lee Brooks, a/k/a Achisson Amenshi, and Larry Joe Brooks, were charged in Tulsa County District Court, Case No. CRM-84-1026, with violating sections of the Cigarette Tax Act. Specifically, they were charged with willfully failing to produce required cigarette sales records, hindering or preventing the inspection of such records, and hindering or preventing the examination of their store in which cigarettes were kept. These acts constitute misdemeanor violations of Title 68 O.S. 1981, § 315, and are punishable by twelve months' imprisonment in the county jail, or a fine not to exceed five hundred dollars ($500.00), or both. *See* 68 O.S. 1981, § 317(b).

The State filed informations against appellees in district court. Appellees then filed a motion to dismiss the charges, claiming that the land on which the alleged offenses occurred is "Indian Country" (*see* 18 U.S.C. 1151(c)) over which there is no state jurisdiction. (O.R.

23-25) In accordance with the appellees' arguments, the trial judge ordered the cause dismissed. The trial judge's order was affirmed by Special District Judge Gordon McCallister. 22 O.S. 1981, Ch. 18, App. Rule 6.2, Rules of the Court of Criminal Appeals. (O.R. 87-88) This case was then brought before this Court on the narrow question of whether the lower court properly dismissed for lack of jurisdiction the charges against appellees, (*see* 22 O.S. 1981, Ch. 18, App. Rule 6.1, Rules of the Court of Criminal Appeals), and we affirmed the lower court's ruling. That opinion, rendered on November 7, 1986, was vacated by order on July 26, 1988, and this opinion on rehearing is delivered.

Appellees are members of the Delaware Tribe of Indians who leased some property from members of the Creek Indian Nation and operated a cigarette store or "smoke shop" thereon. On May 11, 1984, agents of the Oklahoma State Tax Commission went to appellees' smoke shop to seize unstamped cigarettes and tobacco products. One of the agents, Rick Cleary, went into the shop and purchased a carton of cigarettes on which no statutorily required Oklahoma Tax stamps were affixed. *See* 68 O.S.Supp. 1984, § 302. Appellees did not inquire into his status as an Indian or non-Indian prior to making the sale. Later, the other agent, Gertie Rogers, identified herself as an agent of the Oklahoma Tax Commission and requested to enter the store pursuant to her authority under 68 O.S. 1981, § 315. The attendant on duty locked the front door and refused to admit her. He told her not to return without a Federal Marshall because the land was Indian land over which the State had no jurisdiction. (O.R. 4,5)

On May 16, Ms. Rogers signed an affidavit supporting a warrant to search appellee's establishment for unstamped cigarettes and tobacco products, and records of purchases and sales of these items. The next day, Deputy R.D. McAtee accompanied these agents to the smoke shop and attempted to execute the warrant. Appellees refused to comply and were subsequently arrested.

The sole issue before this Court is whether the district court had jurisdiction to enforce certain recordkeeping and inspection provisions of Oklahoma's Cigarette Tax Act against Indians (appellees) who sold cigarettes from an establishment located on Indian lands. Appellees' argument, both at the lower court level and on appeal, is that because they are Indians, and the land in question is Indian Country, they are absolutely shielded from state court jurisdiction under the doctrine of "sovereign immunity." This argument, however, fails to consider the fact that in this unique area of state taxation of Indian cigarette sales, the United States Supreme Court has authorized both state imposition of taxes on sales to non- and off-reservation Indians, and state imposition of certain recordkeeping requirements designed to keep track of those sales – regardless of whether sovereign immunity would, under different circumstances, provide an absolute defense to such regulation. *See Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 155, 100 S.Ct. 2069, 2082, 65 L.Ed.2d 10 (1980). According to *Colville*, neither appellants' status as Indians, nor the status of their land as Indian Country pursuant to 18 U.S.C. §1151(c), would provide them with a sovereign immunity "shield" from state regulation.

Therefore, because the existence or non-existence of appellants' sovereign immunity is irrelevant to the determination of the particular issue at hand, we do not now address it. Instead, our focus will be on what we feel is the dispositive issue: whether the United States Supreme Court cases, which sanction the imposition of state tax and recordkeeping requirements on Indians on Indian Country who sell cigarettes to non- or off-reservation Indians, provide grounds for the state court prosecution of the charges in this case.

The United States Supreme Court has clearly espoused its view of states' attempts to impose their taxes on Indians:

> [I]n the special area of state taxation, absent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation, and *McClanahan v. Arizona State Tax Commission*, [411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973)], lays to rest any doubt in this respect by holding that such taxation is not permissible absent congressional consent.

Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148, 93 S.Ct. 1267, 1270, 36 L.Ed.2d 1114 (1973). Thus, "[i]n the special area of state taxation of Indian tribes and tribal members, we have adopted a *per se* rule [against such a practice]." *California v. Cabazon Band of Mission Indians*, ___ U.S. ___, ___, 107 S.Ct. 1083, 1091 n. 17, 94 L.Ed.2d 244 (1987) (emphasis in original).

These cases were never intended, however, to establish "an inflexible *per se* rule precluding state *jurisdiction* over tribes and tribal members in the absence of express

congressional consent." *Id.* at ___, 107 S.Ct. at 1091 (emphasis added). In fact, "under certain circumstances a State may validly assert authority over the activities of nonmembers on a reservation . . . and . . . in exceptional circumstances a State may assert jurisdiction over the on-reservation activities of tribal members." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331-332, 103 S.Ct. 2378, 2385, 76 L.Ed.2d 611 (1983). Examples of those situations in which a state would be authorized to assert jurisdiction over otherwise immune tribal activities are found in *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976) and *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980). See *Cabazon*, ___ U.S. at ___, 107 S.Ct. at 1091.

In both *Moe* and *Colville* the Supreme Court held that a State can, even in the absence of congressional consent, "require tribal smokeshops on Indian reservations to collect state sales tax from their non-Indian customers." See *Cabazon*, ___ U.S. at ___, 107 S.Ct. at 1092. When the issue is whether an Indian selling cigarettes from a store on Indian land is subject to state regulation of their sales to non-Indians, traditional obstacles to state jurisdiction and control are simply not pertinent: "We do not believe that principles of federal Indian law, whether stated in terms of pre-emption, tribal self-government, or otherwise, authorize Indian tribes thus to market an exemption from state taxation to persons who would normally do their business elsewhere." *Colville*, 447 U.S. at 155, 100 S.Ct. at 2082. *See also The Citizen Band Pottawatomie Indian Tribe of Oklahoma v. The Oklahoma Tax Commission*, No.

CIV-87-0338-W, Order of April 15 (W.D.Okla. 1988). Consequently, even if the lands at issue in the case at bar met the definition of Indian Country under 18 U.S.C. 1151(c), and appellants were, according to current law, found to be Indians, these facts would not automatically preclude state jurisdiction. According to the Court, "[w]hat the smokeshops offer these customers, and what is not available elsewhere, is solely an exemption from state taxation." *Id.* "[I]f a State's tax is valid, the State may impose at least minimal burdens on Indian businesses to aid in collecting and enforcing that tax." *Id.*, 447 U.S. at 159, 100 S.Ct. at 2084.

The United States Supreme Court has thus granted to States the authority both to tax and to impose certain recordkeeping requirements on Indians in Indian Country, regarding their sales of cigarettes to non- or off-reservation Indians. *See Colville*, 447 U.S. at 161, 100 S.Ct. at 2085.[1] While we believe that implicit in this grant of authority is the concomitant power of enforcement through the state court system (*see also Citizen Band Potawatomie*) – which power the State was attempting to exercise in the instant case – such authority is not unconditional. Because the informations in this case did not relate specifically to appellees' cigarette sales to non-Indians or off-reservation Indians, and thus did not meet the United States Supreme Court prerequisite to the exercise of state tax authority over Indians on Indian land, we hold that the State of Oklahoma did not have the power to prosecute and the district court did not have jurisdiction to adjudicate this controversy. Whether these

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[1] An example of a valid recordkeeping scheme can be found in *Colville*, 447 U.S. at 159, 100 S.Ct. at 2084.

charges, if addressed solely to appellees' sales to non-Indians and off-reservation Indians, would be considered valid under current United States Supreme Court precedent is not before this Court. Outside these narrow circumstances, state has no jurisdiction.

For the foregoing reasons, Case No. CRM-84-1026 is AFFIRMED.

A Rule VI appeal by the State, by and through the District Attorney of Tulsa County, from an order of the Honorable Gordon D. McCallister, Special Judge, dismissing for want of jurisdiction a violation of the Cigarette Tax Act in Tulsa County District Court, Case. No. CRM-84-1026. The Court of Criminal Appeals AFFIRMS.

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OPINION BY: BRETT, P.J.
BUSSEY, J.: DISSENTS
PARKS, J.: CONCURS

BUSSEY, J., DISSENTING:

I dissent. Even if the Creek allotment in this case were Indian Country, *c.f. Ex Parte Nowabbi*, 60 Okl.Cr. 111, 61 P.2d 1139 (1936),[1] I do not believe that the defendants in this case are entitled to any consideration for immunity from prosecution. They are Delaware Indians who leased a Creek Tribal allotment to operate a public business. The Supreme Court has determined that Indians

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[1] The Oklahoma Supreme Court has disapproved and withdrawn this case in part. *State ex rel. May v. Seneca-Cayuga Tribe of Oklahoma*, 711 P.2d 77 (Okla.1985). To the extent that Nowabbi may be construed to prevent lands in what was formerly Indian Territory which were allotted to tribes other than the Five Civilized Tribes from coming within the federal definition of Indian Country, I agree that the opinion was overly broad. However, this case involves land allotted to the Creek Tribe, which was among the Five Civilized Tribes.

who reside on a reservation but are not enrolled in the governing Tribe are not immune from taxation by the States. *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 161, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980). If Indians in that situation are not immune from direct taxation by the State, I perceive no basis to consider immunity for these defendants who are not enrolled as members of the Creek Tribe. Furthermore, the State is not even trying to collect taxes from Indians. Rather, it is simply attempting to enforce its right to review records which it may require Indians to keep, even if those Indians are immune from taxation. *Ibid.*

The majority holds that, "Because the charges in this case did not relate specifically to appellees' cigarette sales to non-Indians or off-reservation Indians, *and thus did not meet the United States Supreme Court prerequisite to the exercise of state tax authority over Indians on Indian land,*" (emphasis added) the State lacked jurisdiction. Aside from the fact that the Supreme Court has not announced the "prerequisite" on which this holding turns, the defendants in this case could not have claimed immunity from prosecution in any event. The information filed in this case recited sufficient facts to state a crime under Oklahoma law, and I would reverse the decision of the District Court.

APPENDIX C

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

THE STATE OF OKLAHOMA Appellant, -vs- CHESTER LEE BROOKS, A/K/A ACHISSON AMENSHI, and LARRY JOE BROOKS, Appellees.	)	No. S-85-117
THE STATE OF OKLAHOMA, Appellant, -vs- DICK EARL KLINDT, Appellee.	)	No. S-84-781

ORDER GRANTING PETITION FOR REHEARING AND WITHDRAWING OPINION

(Filed Jul. 26, 1988)

On November 7, 1986, this Court rendered an opinion consolidating two Rule VI appeals: *State v. Klindt*, S-84-781, and *State v. Brooks, A/K/A Achisson Amenshi, and Larry Joe Brooks*, S-85-117. Klindt was charged in Tulsa County District Court, Cases CRF-82-821 and CRM-82-538, with Assault With a Dangerous Weapon (21 O.S.1981, § 645) and Interference With an Officer (21 O.S. 1981, § 267). In a wholly unrelated case, Brooks and Amenshi were charged with Violation of Cigarette Tax Act (68 O.S.1981, §§ 315 and 317(b)) in Tulsa County District Court, Case No. CRM-84-1026. We consolidated these appeals because the district judges who rendered final determinations in each case based their dismissals

for lack of state court jurisdiction on the fact that the defendants in question were Indians and the alleged criminal acts occurred in "Indian Country" (see 18 U.S.C. § 1151).

On December 1, 1986, appellant filed a petition for rehearing. Having reviewed that petition, we find that our previous opinion should be withdrawn and these cases separated. These two cases will therefore be dealt with in separate opinions on rehearing.

IT IS THEREFORE ORDERED that the opinion of this Court in Case Nos. S-85-117 and S-84-781 be WITHDRAWN, and the clerk is so directed.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 26th day of July, 1988.

/s/ Tom Brett
TOM BRETT, PRESIDING JUDGE

/s/ Ed Parks
ED PARKS, JUDGE

ATTEST: James Patterson

_____
(Clerk)